No. 93-743

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

—v.—

LARRY WOLLERSHEIM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Wollersheim's Brief in Opposition seeks to divert the Court from the clear legal issues raised by the petition, by engaging in a lengthy, one-sided and prejudicial presentation of Wollersheim's view of the case. While petitioner disagrees with most of that presentation, even as to what is reflected in the record, it is not necessary here to address or rebut Wollersheim's factual statement, beyond what is stated in the petition at pages 3–13.

What is relevant in considering this petition are the following factors:

1. The Court of Appeal below found that Scientology is a *bona fide* religion, that auditing is its principal religious practice, and that auditing, *per se*, is protected activity under the First Amendment (Pet. 58a–59a).

2. Auditing consists of nothing more nor less than religious speech between an auditor and a church parishioner (Pet. at 3, n.2). Wollersheim's attempt to portray it as a mysterious and nefarious method of "programming" or "brainwashing" individuals must be considered in light of that salient fact.

3. Wollersheim's theory of the case at trial was that he was defrauded into joining the Church by promises about the benefits of auditing, and that he then became so reliant upon auditing that he continually sought it out, to his own emotional detriment. See record citations in Petition at 5–6. Wollersheim's fraud claims were dismissed by the trial court at the conclusion of the presentation of Wollersheim's case–in–chief. He proceeded on his emotional distress claim, which, as his counsel emphasized to the jury, was founded principally on his auditing experiences (RT 14, 713).

4. The Court of Appeal specifically held that the jury's awards of $5,000,000 in compensatory damages and $25,000,000 in punitive damages were the product of passion and prejudice. Pet. 76a, 77a; 20a–22a. Rather than reverse for a new trial, the Court of Appeal itself remitted the damage awards by over ninety per cent.

5. Despite its finding that auditing itself is protected activity under the First Amendment, the Court of Appeal upheld the underlying judgment on Wollersheim's emotional distress claim because it found that evidence existed in the record that Wollersheim was coerced to engage in auditing by physical force or secular threats. The Court of Appeal rejected (*sub silentio*) petitioner's argument that even if such evidence

existed, a new trial is required because the jury may have (indeed, probably did) rest its verdict on the mere provision of auditing to Wollersheim pursuant to his theory of "brain-washing."

ARGUMENT

1. Wollersheim erroneously argues that this Court lacks jurisdiction over the petition, based upon this Court's prior order *granting* certiorari in this case, vacating the judgment, and remanding to the California Court of Appeal for further consideration in light of *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1 (1991). See *Church of Scientology of California* v. *Wollersheim*, 499 U.S. 914 (1991).

In its 1991 order in this case, this Court of course did not reach the merits of any issue. It directed the lower court to reconsider the punitive damage issues raised by the Church, which included the first question raised in the instant petition, in the apparent view that such reconsideration might resolve the case. The Court of Appeal reaffirmed its earlier position, and the case is now back before this Court. Nothing in the Court's earlier grant of certiorari can be construed as barring this subsequent petition from the Court of Appeal's adherence to its earlier positions.

2. Respondent repeatedly suggests that petitioner is requesting *this* Court to determine that the jury verdict was the product of passion and prejudice based upon the fact that the Court of Appeal reduced the verdict by over ninety per cent. Respondent denies that the Court of Appeal itself did anything other than find that the verdict was merely excessive. Resp. Br. at 24 ("The Court of Appeal never made any factual finding of prejudice or passion").

Respondent is wrong. It was the Court of Appeal itself which found that the jury award was the product of passion and prejudice. Indeed, as the Court of Appeal recognized,

under California law it did not have power to disturb the damage awards *unless* it found that passion and prejudice pervaded the verdict. Pet. at 20a–22a; 76a–77a.

The first question here presented is thus whether, given the Court of Appeal's finding that the damage awards *were* the product of passion and prejudice and "preposterous" (Pet. at 78a), a new trial was required on both the damage issues and on the underlying question of liability.

On this central question, respondent is virtually silent, devoting a scant single page (Resp. Br. at 24) with no significant analysis. Respondent ignores, because he cannot answer, the numerous cases and authorities marshalled by petitioner holding that where a verdict is the product of passion and prejudice, an appellate court cannot speculate what an unbiased jury would have concluded on either liability *or* damages. See Petition at 13–21. Rather, in such circumstances, a new trial is required on all issues. *Id.*

Respondent dismisses this Court's decision in *Minneapolis, St. Paul S.S.M. Ry. Co.* v. *Moquin*, 283 U.S. 520 (1931), with the conclusory statement that it is not "applicable . . . to state tort actions," Resp. Br. at 24, ignoring this Court's clear indication in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 160 (1967)—a state tort action—that it is.[1] Respondent makes no mention of the opinions in *Haslip*, 499 U.S. at 9 (Opinion of the Court); *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989); and *TXO Production Corp.* v. *Alliance Resources Corp.*,

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[1] Respondent's attempt to distinguish *Butts* (Resp. Br. at 24, n. 15) is incomprehensible. The *Butts* Court *not only* referred to the power of a court to remit an excessive verdict, as respondent notes, but *further* restated "the general rule that a verdict based upon jury prejudice cannot be sustained even when punitive damages are warranted," citing *Moquin*. Respondent can provide no explanation why this Court specifically cited *Moquin* and the *Moquin* rule in *Butts* if, as respondent argues, *Moquin* has no applicability to state tort actions.

____ U.S. ____, 113 S.Ct. 2711, 2725 (1993) (Kennedy, J., concurring in part and in the judgment), and at 2729 (O'Connor, J., dissenting), reiterating that a jury verdict founded in any part upon passion and prejudice cannot stand.

Respondent does string cite, with no analysis, six cases for the proposition that reduction of damages, rather than a new trial, is the proper remedy for an excessive verdict where there has been no finding of passion and prejudice on the issue of liability.[2] The six cases do not so hold. Two of the cases, *Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1966), and *Sabella* v. *Southern Pacific Co.*, 70 Cal.2d 311, *cert. denied*, 395 U.S. 910 (1969), have nothing to do with either punitive damages *or* jury passion and prejudice. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), as we have seen, directly contradicts Wollersheim's position, stating that merely excessive awards may be remitted, but that a "verdict based on jury prejudice cannot be sustained even when punitive damages are warranted." *Id.* at 160. *Edwards* v. *Sears-Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975), involved an award of general damages and a new trial *was* required on a finding of passion and prejudice. *Id.* at 283. Even if *Edwards* could be construed to support a remittitur of punitive damages upon a finding of passion and prejudice, that construction has been expressly and repeatedly rejected by the Fifth Circuit. *See Simeon* v. *T. Smith & Son, Inc.*, 852 F.2d 1421, 1426 (5th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989) ("While mere excessiveness in the amount to be awarded may be cured by a remittitur, that excessivness which results from passion and prejudice . . . may not be so cured. A new trial must be

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[2] As already noted, the Court of Appeal in this case explicitly held that the damage awards *were* the product of passion and prejudice. The very question presented here, which respondent consistently begs, is whether such a finding compels a new trial, at least on the question of damages and ultimately on all issues. As explained above, respondent's six cases do not support his proposition that the proper remedy in such circumstances is for the appellate court to reduce the damage awards itself.

ordered when the verdict results from passion and prejudice"); *Wells* v. *Dallas Independent School Dist.*, 793 F.2d 679, 683 (5th Cir. 1986).

Seymour v. *Summa Vista Cinema, Inc.*, 809 F.2d 1385 (9th Cir. 1987), involved a remittitur of *compensatory* damages upon a finding of "an excessive verdict," which "*may* have resulted from passion and prejudice," and relied solely upon cases and commentary concerning excessive compensatory awards without reference to passion and prejudice. *Id.* at 1387 (emphasis added). Here, of course, the Court of Appeal applied California's much more stringent standard that requires that the *punitive* "award *was* the result of passion or prejudice." *Wollersheim* v. *Church of Scientology of California*, 212 Cal.App.3d 872, 906, 260 Cal.Rptr. 331, 353 (1989) (emphasis added). In *Melandris* v. *Merrill Lynch*, 703 F.2d 1152 (9th Cir. 1981), *cert. denied*, 464 U.S. 825 (1983), the court carefully distinguished between jury passion and prejudice, which requires a new trial, and error in an "excessive damage award," which may be cured by remittitur. *Id.* at 1168. The court, in remitting the punitive award, found only that it was "excessive and unwarranted," not that it resulted from passion and prejudice. *Id.* at 1177–78.

Wollersheim is unable to cite any authority that a court may remit, rather than vacate, a punitive award found to be the result of passion and prejudice.[3] Wollersheim further ignores the Church's showing (Pet. at 18) that California's punitive damages system, as in this case, provides no rational princi-

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[3] Even if Wollersheim were able to cite cases holding that an appeals court can merely remit a verdict where the compensatory and punitive damage awards are found to have been the product of passion and prejudice, such cases would be in direct conflict with the solid line of authority petitioner cited in the petition at pages 16–18, which Wollersheim totally ignores. Such a conflict would strongly support the granting, rather than the denial, of the instant petition. Indeed, the petition itself recognized that at least several courts have not strictly applied the new trial rule enunciated in *Moquin* and its progeny. Petition at 18–19.

ples or procedures to guide a court in determining when to remit and when to vacate a punitive damage award, in direct violation of *Haslip*'s requirement that review of punitive awards must be based on rational, consistently applied principles and procedures. *Haslip*, 499 U.S. at 20–23.

3. Wollersheim utterly ignores petitioner's argument that the Court of Appeal failed to apply the rule that a verdict that may have rested upon grounds violative of the First Amendment must be reversed for a new trial, even if permissible grounds to sustain the verdict also may have existed in the record. *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966); *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982).

Wollersheim instead engages in a lurid and prejudicial exegesis on Scientology's peaceful religious practice of auditing, all the time ignoring the fact that even the Court of Appeal recognized that the provision of auditing is protected activity under the First Amendment. Despite that holding, the Court of Appeal affirmed the underlying verdict because it found evidence in the record to support a claim that Wollersheim was coerced—in the ordinary secular fashion—to undergo auditing, and that the secular coercion was actionable.

Petitioner does not dispute that physical coercion or threats of secular retribution or force indeed are actionable. Petitioner does dispute that there was evidence of such coercion in this case, but that is not the issue on this petition. Rather, the issue raised is whether the trial court and the Court of Appeal were required to insure that liability and damages be premised exclusively upon such coercive activity, and not at all upon the protected activity of auditing, *per se*.

The *Gibbs* and *Claiborne Hardware* cases clearly mandate an affirmative answer to that question. Wollersheim does not argue otherwise. He chooses to ignore the issue, precisely because the constitutionally mandated rule requires reversal of the judgment in this case. Not only does substantial evi-

dence exist that Wollersheim undertook auditing without being forced or threatened to do so (albeit, he claims because he was "brainwashed"), but indeed Wollersheim's theory of the case was that he was lured into becoming "addicted" to auditing so that he kept coming back for more and more of it. Wollersheim's theory was inconsistent with the secular coercion ground upon which the Court of Appeal affirmed the judgment. At the least, a new trial was required because "[i]t is impossible to conclude that state power has not been extended to compensate [Wollersheim] for the direct consequences of nonviolent, constitutionally protected activity." *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. at 923.

4. Wollersheim's strategy for defeating this petition is to ignore the questions presented and to interpose a lengthy, one–sided and largely irrelevant recital of his version of the case. Indeed, it is obvious that Wollersheim takes fundamental issue with the conclusions of the Court of Appeal that Scientology is a *bona fide* religion, that auditing is protected religious activity, that the jury was infected with passion and prejudice, and that the verdict was "preposterous" (78a).[4]

Despite the above holdings, the Court of Appeal seriously erred in not concluding that for the various reasons raised in the petition, a new trial was required under both the due process clause and the First Amendment. The issues raised are serious and arise often. This Court need not become enmeshed in the detailed analysis of the factual record as set forth in Wollersheim's non–responsive brief in opposition. Certiorari should be granted to resolve the legal questions raised in the petition.

5. Finally, the Court's recent order granting certiorari in *Honda Motor Co, Ltd.* v. *Oberg*, No. 93–644, *cert. granted*, 114 S.Ct. 751 (1994), raises issues similar to those raised by

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[4] Wollersheim's petition for writ of certiorari raising these issues was denied four years ago. *Wollersheim* v. *Church of Scientology of California*, 495 U.S. 910 (1990).

the instant petition. In *Oberg*, the petition raises the question of whether Oregon's failure to provide judicial review of "excessive" verdicts violates due process. The Oregon Supreme Court has ruled that Art. VII, Sec. 3 of the Oregon Constitution of 1910 stripped the Oregon courts of their power to set aside a verdict for excessive damages. *Van Lom* v. *Schneiderman*, 187 Or. 89, 210 P.2d 461 (Or. 1949).

It is more than worth noting that the *Van Lom* Court distinguished between damages which are merely excessive and verdicts which are the product of passion and prejudice of the jury, 187 Or. at 105–06, and explicitly left open the question whether the Oregon Constitution bars review of the latter category of cases. *Id.* It further is noteworthy that prior to adoption of the Oregon Constitution of 1910, trial courts were held to have power to remit merely excessive verdicts, but were required to grant a new trial where the verdict was the product of passion and prejudice. *Adcock* v. *Oregon Railroad Co.*, 45 Or. 173, 77 P.78 (1904).

In addressing the due process issues raised in *Oberg*, this Court may well be required to consider the questions both from the perspective of a merely "excessive" verdict and also from the perspective of a verdict infected with passion and prejudice. The Court may hold that judicial review of the verdict is required in both instances, just in the latter, or in neither. The question of the appropriate and constitutionally required judicial remedy in each instance will also be presented.

Petitioner respectfully submits that the instant case presents such a closely related question to that raised in *Oberg* that the two cases should be considered in tandem[5]. Certiorari should be granted so that the Court may decide not only whether judicial review of a jury verdict is required for either excessiveness or passion and prejudice, but also whether in the lat-

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[5] Petitioner, of course, would be prepared to brief this case on an expedited basis to meet the Court's schedule for argument in *Oberg*.

ter circumstance, the court must order a new trial rather than remit the verdict.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

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Respectfully submitted,

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